

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
CASE NO.: 22-14020-CR-CANNON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JULY 27, 2022

FORT PIERCE, FLORIDA

ERNESTO PEREZ-PINA,

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Defendant.

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TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: DIANA ACOSTA, AUSA
Office of U.S. Attorney
101 South U.S. Highway 1
Fort Pierce, Florida 34950

FOR THE DEFENDANT: PETER BIRCH, AFPD
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REPORTED BY: DIANE MILLER, RMR, CRR, CRC
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P-R-O-C-E-E-D-I-N-G-S

THE COURT: Good afternoon. Please be seated.

THE COURTROOM DEPUTY: Calling case 22CR14020-Cannon USA versus Ernesto Perez-Pina, could we have the parties enter their appearance beginning with the Government.

MS. ACOSTA: Diana Acosta on behalf of the United States. Good afternoon, Your Honor.

MR. BIRCH: Good afternoon, Your Honor; Peter Birch, representing Ernesto Perez-Pina, who is seated to my left.

THE COURT: Good afternoon, Mr. Birch.

And good afternoon, Mr. Perez-Pina.

There is a certified interpreter here, Mr. Perez-Pina. Have you been able to understand everything that has transpired thus far with the aid of the interpreter?

THE DEFENDANT: Yes.

THE COURT: Okay. If, at any point, you don't understand anything, please let me know, okay?

THE DEFENDANT: Yes, all right.

THE COURT: All right. We are here for sentencing in this matter. The record reflects, sir, that you pled guilty before Magistrate Judge Maynard to the sole count of the indictment with -- although it indicates a charge of Title VIII, United States Code, Sections 1326(a) and (b)(1), it was ultimately corrected on the record at the change of plea hearing and identified as only Section 1326(a).

1 Is that correct, Mr. Birch?

2 MR. BIRCH: Yes, Your Honor.

3 THE COURT: Okay. I obtained the transcript of that
4 change of plea hearing for the avoidance of any doubt, and that
5 transcript will be made part of the record.

6 Anything with respect to the correct charge in this
7 case, Ms. Acosta?

8 MS. ACOSTA: No, Your Honor. We agree because he
9 doesn't have the requisite prior misdemeanors that would
10 qualify, so it is definitely a 1326(a).

11 THE COURT: With that confusion clarified, I'll just
12 state further, the Court thereafter adopted Judge Maynard's
13 report and recommendation; so, Mr. Perez-Pina, you have been
14 adjudicated guilty of Title -- of illegal reentry after removal
15 in violation of Title VIII, United States Code, Section
16 1326(a), and so I will make a correction to the Court's order
17 adopting the report and recommendation at docket entry 24.
18 Paragraph three of that order has an error. It should say
19 Title VIII, United States Code, Section 1326(a) with no
20 reference to subsection (b)(1).

21 Ms. Spielle -- and I'm sorry, I did not ask for your
22 appearance.

23 PROBATION OFFICER: Good afternoon, Your Honor;
24 Claire Spielle on behalf of U.S. Probation.

25 THE COURT: Are there any corrections that need to be

1 made to the PSI or references to (b) (1)?

2 PROBATION OFFICER: Your Honor, the PSI is calculated
3 based -- I apologize.

4 THE COURTROOM DEPUTY: I'll turn it down.

5 PROBATION OFFICER: Your Honor, on page -- in the
6 offense level computation on page 5, it does reference 1326A,
7 (b) (1), but that is the only place that it's referenced, but it
8 is not calculated as (b) (1), it is calculated at 1326A.

9 THE COURT: So that's the sole reference to (b) (1),
10 in the PSI?

11 PROBATION OFFICER: Yes. So we can correct that,
12 Your Honor -- if Your Honor wishes, but everything is
13 calculated as if it was a 1326A.

14 THE COURT: And you referenced which paragraph?

15 PROBATION OFFICER: So it is paragraph 14 on page 5.

16 THE COURT: Yes. I think just to make sure
17 everything is accurate, I'll ask that revised PSI be prepared
18 without any references to (b) (1). Okay.

19 PROBATION OFFICER: Yes, Your Honor.

20 THE COURT: All right. Mr. Perez-Pina, have you had
21 an opportunity to review the PSI in this case, the presentence
22 investigation report?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you need any additional time to
25 discuss any matters related to sentencing with your attorney?

1 THE WITNESS: No. It's all right.

2 THE COURT: Mr. Birch, are you aware of any legal
3 reason precluding the imposition of sentence today?

4 MR. BIRCH: No, Your Honor.

5 THE COURT: All right, let's proceed.

6 I see no objections were filed to the PSI; is that
7 correct, Mr. Birch?

8 MR. BIRCH: That's correct, Your Honor.

9 THE COURT: Is that your understanding, Ms. Acosta?

10 MS. ACOSTA: Yes, Your Honor.

11 THE COURT: All right. The Court will then adopt the
12 PSI, at docket entry 29, in full with that minor clarification
13 noted earlier and state for the record the applicable guideline
14 range which is based on a total offense level of eight, a
15 criminal history category of three which produces an advisory
16 guideline range of 6 to 12 months imprisonment. There is a
17 recommended range of supervised release of one year, a
18 recommend fine range of \$2,000 to \$20,000, although no fine is
19 recommended, and the mandatory special assessment of \$100.

20 Is that correct, Mr. Birch?

21 MR. BIRCH: Yes, Your Honor.

22 THE COURT: Ms. Acosta?

23 MS. ACOSTA: Yes, Your Honor.

24 THE COURT: Okay. By the way, masks are optional for
25 anyone who prefers to not wear it.

1 All right. Having adopted the PSI in full along with
2 the calculations herein, I'll now proceed to hear argument on
3 an appropriate sentence starting with the Government.

4 MS. ACOSTA: Your Honor, we are asking for a sentence
5 at the high end of the guideline range which would be 12
6 months. Looking at the 3553 factors, we believe that sentence
7 is appropriate, based on the fact that he does have a total of
8 five removals from the United States spanning, I believe, 2010
9 through 2014, I believe.

10 In addition, he was convicted of three misdemeanors
11 of 1325A related to some of those removals. And, in fact, he
12 was found in the United States after his last removal. We know
13 he was here because he was stopped and given a citation for
14 driving without a license. That was in 2019, so even though --
15 and in those circumstances, for whatever reason, ICE was not
16 notified, apparently, that he was back in the country. So he
17 was not removed in 2019. Not until he was found in Indian
18 River County did ICE again contact him or interact with him,
19 and that's why we are here today.

20 I would note that for whatever reason, the prior
21 jurisdictions that learned of his presence chose to charge him
22 with just 1325A which really is not a reflection of the
23 defendant. That's what they charged him with. He did admit to
24 each of those entries; but, now, the time has finally come that
25 he is charged with a felony offense, and we believe that a

1 one-year sentence pursuant to the 3553 factors is sufficient or
2 at least warranted, A, to reflect the seriousness of the
3 offense because, seriously, you can see the way he was treated
4 by the different encounters that perhaps he didn't think it was
5 so serious because he got a slap on the wrist, removed and came
6 back, got a slap on the wrist and removed and came back. So we
7 think that a year would be that, no, it is not a slap on the
8 wrist, that your penalties -- the consequences are going to
9 escalate, they will go up. You are going to be charged with
10 (b)(1), not just the A, to promote respect for the law and to
11 provide just punishment and to provide adequate deterrence so
12 that he won't come back.

13 So for those reasons, we believe that a sentence at
14 the high end, 12 months, is appropriate in this case.

15 THE COURT: Thank you.

16 Mr. Birch?

17 MR. BIRCH: Thank you, Your Honor.

18 I believe this would be his fifth removal with four
19 prior removals, but I don't know that really matters. I have
20 to concede that Mr. Perez-Pina needs to understand that he
21 couldn't do it this way; and it is, I can understand, troubling
22 that he has come back repeatedly. We don't make excuses for
23 that other than he has had difficulty in Mexico, and then
24 having family here provides somewhat of a magnet for wanting to
25 come back. That doesn't excuse it. I'm not trying to excuse

1 it, but I would say it is certainly to his credit that he
2 doesn't come back and engage in a string of criminal activity.
3 His criminal history is minimal, but for the fact that he keeps
4 coming back and he needs to understand, he can't do it this
5 way.

6 The guideline range of six to 12 months includes
7 consideration of the prior removals and sentences that he
8 received. He gets a two-level increase for that, and I believe
9 it's five criminal history points which puts him in criminal
10 history category three as a result of these prior removals.

11 With that having been said, Your Honor, it is
12 still -- understandably, it needs to get through to
13 Mr. Pina-Perez *[sic]* that -- excuse me, Perez-Pina that he
14 can't do it this way. And that is why, to be honest with you,
15 I'm not asking for the bottom of the guidelines, and I
16 discussed this with Mr. Perez-Pina, but I think that nine
17 months would be sufficient but not greater than necessary under
18 all of the 3553(a) circumstances in imposing sentence. That's
19 still a lengthy sentence. He will have to do it day for day,
20 and I would ask the Court to consider that and, hopefully,
21 Mr. Perez-Pina gets the message.

22 He understands that he is violating the law. He
23 would like to address the Court on that, but I would ask the
24 Court to consider a nine-month sentence for the reasons I have
25 stated.

1 THE COURT: Thank you, Mr. Birch.

2 Mr. Perez-Pina, you have the opportunity to address
3 the Court, if you wish. And I want to make sure I hear you
4 well, so please speak clearly into the microphone.

5 THE DEFENDANT: I just wanted to apologize again.
6 And I understand that I failed with those reentries, but I had
7 to work so I can give my children a better life.

8 Okay, that's all.

9 THE COURT: Thank you, sir.

10 The Court has considered the statement of all
11 parties, the presentence report which contains the advisory
12 guidelines and the statutory factors as set forth in Title 18,
13 United States Code, Section 3553(a).

14 It is the finding of the Court that the defendant is
15 not able to pay a fine.

16 I have taken a very close look at the presentence
17 investigation report; and, as the Government indicates, and
18 there is no dispute, unfortunately, there is a very troubling
19 and repeated pattern of violating immigration law in this case
20 starting in 2010. As reflected in paragraph six, the defendant
21 was ordered removed and removed in August of 2010. At some
22 point thereafter, as reflected in paragraph seven, the
23 defendant re-entered the United States. The removal order was
24 reinstated in March of 2012, and he was then again removed in
25 April of 2012.

1 In March of 2012, he was convicted of misdemeanor
2 entry by an alien in the Western District of Texas, and he was
3 sentenced in that case to 30 days imprisonment. That
4 unfortunately did not deter the defendant from continuing to
5 violate immigration law.

6 As we see in paragraph eight, he subsequently
7 re-entered the United States again, and his removal order was
8 again reinstated on or about July 24th of 2013, and he was
9 removed in September of 2013. Prior to that September 2013
10 removal, he sustained an additional misdemeanor conviction for
11 improper entry by an alien, at that time, in the Southern
12 District of Texas. Then, he re-entered again, as reflected in
13 paragraph nine.

14 The removal order was reinstated, and he was removed
15 in January of 2014. Prior to that January 2014 removal, he was
16 convicted for another misdemeanor, improper entry by an alien
17 in the Southern District of Texas. That's all in paragraph
18 nine. In addition to that, we have a conviction, in paragraph
19 27, for driving without a valid driver's license which,
20 although on its face appear relatively nominal, it is just
21 another indication of the defendant's history of disregarding
22 U.S. law. So the Court unfortunately is left with a pattern of
23 repeated criminal violations.

24 I would note in addition, those prior convictions,
25 they escalated in punishment from 30 days to 60 days and then

1 to 120 days; again, the message obviously wasn't sufficient to
2 deter more illegal reentries as indicated in the PSI. So for
3 those reasons, in light of the need to promote the respect for
4 the law, to provide just punishment, and to specifically deter
5 this defendant from continuing to violate the law, the Court
6 believes under the 3553(a) factors that an upward variance is
7 warranted and quite reasonable in this case, based on a review
8 of the full record and will impose an upward variance of 18
9 months imprisonment in this case which the Court finds to be
10 reasonable and appropriate under the circumstances and in light
11 of all of the statutory factors.

12 It is the judgment of the Court that the defendant,
13 Ernesto Perez-Pina, is committed to the Bureau of Prisons to be
14 imprisoned for a term of 18 months. Upon release from
15 imprisonment, the defendant shall be placed on supervised
16 release for a term of one year. Within 72 hours of release,
17 the defendant shall report in person to the probation office in
18 the district where released. While on supervised release, the
19 defendant shall comply with the mandatory and standard
20 conditions of supervised release which include not committing
21 any crimes, being prohibited from possessing a firearm or other
22 dangerous device, not unlawfully possessing a controlled
23 substance, and cooperating in the collection of DNA.

24 The defendant also shall comply with the following
25 special conditions: Surrendering to Immigration for removal

1 after imprisonment and unpaid restitution, fines, or special
2 assessments as noted in Part F of the presentence investigation
3 report. It is further ordered that the defendant shall pay
4 immediately to the United States a special assessment of \$100.

5 The total sentence is therefore 18 months
6 imprisonment, one year supervised release, and a 100-dollar
7 special assessment.

8 Now that sentence has been imposed, does the
9 defendant or his counsel object to the Court's finding of fact
10 or to the manner in which sentence is pronounced?

11 MR. BIRCH: Yes, Your Honor. We would object to the
12 upward variance as being both procedurally and substantively
13 unreasonable. I would submit that it's procedurally
14 unreasonable because it focuses on one factor over others;
15 specifically, if I understood the Court correctly, his pattern
16 of repeated violations seems to be focusing on his prior
17 illegal entries whereby that's already been accounted for in
18 the sentencing guideline range. I would submit that it's
19 substantively unreasonable because it is beyond what is
20 necessary or sufficient under the 3553(a) factors.

21 THE COURT: All right. Thank you very much,
22 Mr. Birch.

23 Mr. Perez-Pina, you have a right to appeal the
24 sentence imposed. Any notice of appeal must be filed within 14
25 days after entry of the judgment. If you are unable to pay the

1 cost of an appeal, you may apply for leave to appeal in forma
2 pauperis.

3 Anything further from Mr. Birch or Ms. Acosta?

4 MS. ACOSTA: No, Your Honor.

5 MR. BIRCH: No, Your Honor. Thank you.

6 THE COURT: Thank you.

7 God bless you, sir.

8 The Court is in recess.

9 (PROCEEDINGS ADJOURNED AT 2:23 p.m.)

10 **C-E-R-T-I-F-I-C-A-T-E**

11 I hereby certify that the foregoing is
12 an accurate transcription and proceedings in the
13 above-entitled matter.

14 **9/11/2022**

15 DATE

/s/DIANE MILLER

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